Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-503

BILLY D. COOK, LOULA JUANITA MILTON ADAMS, MRS. W. P. WRIGHT, *Petitioners*

v.

ROGER W. HUDSON, JOHN BURT, JAMES SIDNEY WARNER, R. W. MALLORY, NORMAN WILTON GRIFFIN, BROOKS BRASHER, N. F. HANSON, Board of Education, Calhoun County, Mississippi, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
I. Opinions Below	2
II. Jurisdiction	2
III. Question Presented	2
IV. Constitutional Provisions and Regulation	2
V. Statement of the Case	3
VI. Reasons for Granting the Writ	10
The Decision Below Decides a Federal Question in a Way Which Conflicts With Applicable Decisions of This Court	10
A. Preliminary Statement	10
B. Balancing Individual and State Interests	11
C. Equal Protection	16
D. Due Process	18
Decision Below Conflicts With Decisions of Other Courts of Appeals	20
VII. Conclusion	28
Appendix	1a

AUTHORITIES CITED

Cases:

Adler v. *Board of Educ.*, 342 U.S. 485	11, 15
Andrews v. *Drew Municipal School Dist.*, 507 F.2d 611 (5th Cir. 1975)	28
Augustus v. *School Board*, 507 F.2d 152 (5th Cir., 1975)	13
Ancanfora v. *Bd. of Educ.*, 491 F.2d 498 (4th Cir.)	26
Banks v. *Muncie Community Schools*, 433 F.2d 292	13

Page

Birdwell v. *Hazelwood School Dist.*, 491 F.2d 490 (8th Cir., 1975) 24
Cleveland Bd. of Educ. v. *LaFleur*, 414 U.S. 632, 639, 643 .....10, 18, 19
Dombrowski v. *Pfister*, 380 U.S. 479, 491 11
Duke v. *North Texas State Univ.*, 469 F.2d 829 (5th Cir., 1975) 24
Dunn v. *Blumstein*, 405 U.S. 303, 343 16
Fisher v. *Snyder*, 346 F. Supp. 396 (D. Neb. 1972) ..26, 27
Fluker v. *Alabama State Bd. of Educ.*, 441 F.2d 201 (5th Cir., 1971) 26
Gierenger v. *Central School Dist.*, 477 F.2d 1164 (8th Cir.) 27
Ginsberg v. *New York*, 390 U.S. 629, 639 13
Green v. *County School Board*, 391 U.S. 430 12
Healy v. *James*, 408 U.S. 169 .....13, 21
Hostrop v. *Board of Junior College Dist. No. 515*, 471 F.2d 488, 492 (7th Cir., 1972) 26
James v. *Board of Educ.*, 461 F.2d 566 (2d Cir.) 24, 25
Joyner v. *Whiting*, 477 F.2d 456 (4th Cir., 1983) 13
Keckeisen v. *Independent School Dist.*, 509 F.2d 1062 (8th Cir., 1975) 23, 24
Keyishian v. *Board of Regents*, 385 U.S. 589, 605-06 12, 17, 21
Los Angeles Teachers Union v. *Los Angeles Bd. of Educ.*, 71 Cal.2d 551, 455 P.2d 827, 835 n. 13, 78 Cal. Reptr. 723 (1969) 16
McCrary v. *Runyon*, 515 F.2d 1082 (4th Cir.), petitions for cert. filed, 44 U.S.L.W. 3098 (U.S. Aug. 12, 1975) (Nos. 15-62; 75-66; 75-278) 17
Minersville School Dist. v. *Gobitis*, 310 U.S. 586 28
Norwood v. *Harrison*, 413 U.S. 455, 457 .....13, 14
Papish v. *Board of Curators*, 410 U.S. 667 21
Paris Adult Theatre I v. *Slayton*, 413 U.S. 49 15
Perry v. *Sinderman*, 408 U.S. 593 12
Pickering v. *Board of Educ.*, 391 U.S. 563 ...10, 11, 12, 14, 15, 20, 21, 23, 24, 26, 27
Pierce v. *Society of Sisters*, 268 U.S. 510 .....11, 13
Rampey v. *Allen*, 501 F.2d 1090 (10th Cir., 1974) 26
Reed v. *Reed*, 404 U.S. 71 18
Roe v. *Wade*, 419 U.S. 113, 152-53 13

Page

Russo v. *Central School Dist.*, 469 F.2d 623 (2d Cir., 1972), cert. denied, 411 U.S. 932 (1973) 24
San Antonio Ind. School Dist. v. *Rodriguez*, 411 U.S. 1 11
Shapiro v. *Thompson*, 394 U.S. 618, 634 16
Shelton v. *Tucker*, 364 U.S. 479 21
Smith v. *Losee*, 485 F.2d 334 (10th Cir., 1973) 26
Smith v. *St. Tammany Parish School Bd.*, 448 F.2d 414 (5th Cir., 1970) 13
Smith v. *United States*, 502 F.2d 512 (5th Cir., 1974) .. 26
Stanley v. *Illinois*, 405 U.S. 645 19
Tinker v. *Des Moines Community School Dist.*, 393 U.S. 503, 509 .....20, 21, 23, 24, 25, 26, 27
United Public Workers v. *Mitchell*, 330 U.S. 75 11
United States Civil Service v. *National Ass'n of Letter Carriers*, 413 U.S. 458 11
Vlandis v. *Kline*, 412 U.S. 441 20
Whitsell v. *Southeast Local School Dist.*, 484 F.2d 1222 (6th Cir., 1973) 26

LAW REVIEW AND OTHER SECONDARY MATERIALS:

Note, *Teachers' Freedom of Expression Outside the Classroom: An Analysis of the Application of Pickering and Tinker*, 8 GA. L. REV. 900, 918 (1974) 27

Comment, *The "Little Red Schoolhouse" and the Communists: New York State Struggles With the Problem of Educating in a Free Society*, 35 CORN. L. Q. 824, 826 (1950) 28

Cook v. Hudson: The State's Interest in Integration v. The First Amendment Rights of Public Schoolteachers, 45 MISS. L.J. 953 (1974) 15, 27

Davidson & Land, Children's Perception of Their Teachers' Feeling Toward Them Related to Self-Perception, School Achievement & Behavior, 29 J. EXPERIMENTAL EDUC., 107, 112 (1960) 23

Dyer, *School Factors & Equal Education Opportunity*, 38 HARV. EDUC. REV. 38, 39 (1968) 22

S. Koslin, B. Koslin & R. Paragement, *Efficacy of School Integration Policies in Reducing Racial Polarization*, 1972 at 14 23

Page

Rosenthal, *The Pygmalion Effect Lives*, Sept. 1973 Psychology Today 56 8

Note, *Segregation Academies & State Action*, 82 Yale L.J. 1436, 1443 (1973) 4

Statutes:

28 U.S.C. § 1343 (3) (1970) 4
42 U.S.C. § 1983 (1970) 4
Miss. Code Ann. § 37-9-17 (1973) 5
Miss. Sess. Laws, Chapter 459, Laws of 1974 28

Texts:

Beale, A History of Freedom of Teaching in American Schools (1941) 28

K. Clark, Prejudice and Your Child 31 (2d ed. 1963) 17

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C. Jencks, Inequality 8 (1972) 17

Mississippi Dept. of Educ., Non-Public Schools 1974-5 at 2 (1975) 4

Mississippi Div. of Admin. & Fin., Public School Enrollment 1974-5 at 9 (1975) 4

IN THE

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No.

Billy D. Cook, Loula Juanita Milton Adams, Mrs. W. P. Wright, *Petitioners*

v.

Roger W. Hudson, John Burt, James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher, N. F. Hanson, Board of Education, Calhoun County, Mississippi, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Billy D. Cook, Loula Juanita Milton Adams and Mrs. W. P. Wright respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 21, 1975.

I.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 511 F.2d 744. (App. 2a) The denial of rehearing is not reported. (App. 1a) The opinion of the United States District Court for the Northern District of Mississippi is reported at 365 F. Supp. 855. (App. 30a)

II.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 21, 1975. A timely petition for rehearing en banc was denied on July 3, 1975 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III.

QUESTION PRESENTED

Whether, consistent with the First and Fourteenth Amendments, a public school board may terminate the employment of all teachers not sending their children to public schools.

IV.

CONSTITUTIONAL PROVISIONS AND REGULATION

United States Constitution—First Amendment:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

United States Constitution—14th Amendment:

Section 1. All persons born or naturalized in the the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Policy: Calhoun County Board of Education:

Prior to the employment of a new teacher, or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi will be required to attend the public schools of Calhoun County or said teacher will not be employed or reemployed.

V.

STATEMENT OF THE CASE[1]

In November of 1972, the public school board in Calhoun County, Mississippi verbally adopted the following policy:

> Prior to the employment of a new teacher, or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi, will be required to attend the public schools of Calhoun County or said teacher will not be employed or reemployed. [App. 5a.]

At that time, petitioners represented over twenty years of teaching experience.[2] Refusing to comply

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[1] With the curtailment of a First Amendment right, a detailed statement is in order. Tinker v. Des Moines Community School Dist., 393 U.S. 503, 509; Pickering v. Board of Educ., 391 U.S. 563; Blackburn v. Alabama, 361 U.S. 199, 205 n.5 ("[W]e cannot escape the responsibility of scrutinizing the record.")

[2] Cook (8 years); Wright (8 years); Adams (4½ years).

with the policy, their contracts were not renewed after the expiration of the 1972-73 school year. Their response was a 1983 [3] suit in the Northern District of Mississippi seeking reinstatement and back pay. Evidence presented may be briefly summarized:

(1) *Petitioners*:—Petitioners have children enrolled in Calhoun Academy; a private, segregated facility in the county established in 1968.[4] It is undisputed that petitioners are competent (Record, vol. 1, at 5, 16, 169) and compatible with the school administration. (Record, vol. 1, at 69-70; 162-3) More importantly, there had been no complaints from students, parents, fellow faculty members, or the administration, relating to their children or questioning their commitment [5] or teaching ability. This status was maintained at all

[3] 42 U.S.C. § 1983 (1970). Jurisdiction was based on 28 U.S.C. § 1343(3) (1970). Named defendants included the principal, superintendent of the board of education, members of the board, and the board itself.

[4] Sponsored by the local chapter of the White Citizens' Counsel (states' rights; racial integrity). The current minimal impact of the facility is best demonstrated by present enrollment; the private academy has approximately 164 students while the public system serves over 3,368. *Compare* MISSISSIPPI DEPT. OF EDUC., NON-PUBLIC SCHOOLS 1974-5 at 2 (1975) *with* MISSISSIPPI DIV. OF ADMIN. & FIN., PUBLIC SCHOOL ENROLLMENT 1974-5 at 9 (1975). The county's situation is fairly representative of the current status of segregated academies not located in predominantly Black districts, *i.e.*, stabilized or decreasing enrollment. Note, *Segregation Academies & State Action*, 82 Y. L. J. 1436, 1443 (1973). These facts, of course, somewhat qualify this Court's finding in Norwood v. Harrison, 413 U.S. 455, 457, that: "Private schools in Mississippi have experienced a marked growth in recent years."

[5] The only evidence in the record reflecting some qualms concerning the public school system is a statement by petitioner Wright (on cross examination) that she was not "totally committed" to a desegregated school system. (Record, vol. 1, at 103)

times prior to adoption of the policy and in the period of remaining employment (Nov., 1972-June, 1973). As stipulated, the *sole* basis for termination was violation of the policy (Record, vol. 1, at 5, 16), and therefore not related to any subjective or objective reasons which the petitioners possessed at the time their choice was made.[6]

(2) *Scope of the Policy*:—The board's policy requires every teacher living in Calhoun County to send his or her children to the public schools in that county. Though not expressly limited, the school board president testified that the policy was adopted with only Calhoun Academy in mind. (Record, vol. 2, at 21-22; 31-32) Petitioners, however, could only be rehired upon recommendation of the principal,[7] Roger Hudson. His interpretation of the policy required literal enforcement, *i.e.*, no exceptions for children with hearing problems or for teachers wishing to send their children to a parochial school. (Record, vol. 1, at 17, 25-7, 40)

(3) *Reason for Adoption; Subsequent Justification*:—Prior to adoption of the policy the board noti-

[6] Considerable trial time was spent in an extensive inquiry into petitioners' motivations. Some reasons, such as calmer environment, smaller classes, religious training and location appear valid; others do not (not wanting son in same school; need for speech therapist). See Record, vol. 1, at 40-103. The trial judge found that "the dominant . . . reason why each plaintiff enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system." App. 34a. Quite obviously, this applies to all teachers sending their children to any private school (segregated or not).

[7] "On or before April 1st of each year, the principal of each school shall recommend to the superintendent . . . the teachers to be employed . . . ." MISS. CODE ANN. § 37-9-17 (1973).

fied eight teachers having children enrolled at Calhoun Academy that their contracts would not be renewed. (Supp. App. at 51; Record, vol. 2, at 24) The board's attorney wrote the Department of Justice concerning the legality of this action. This letter noted that he had advised the board members that they were under an obligation "to do all affirmatively necessary to advance integration." With respect to the board's position:

> [They] also feel that our faculty members should be dedicated to the public school program, and also that their sending their children to the private school is indicative of the fact that they do not feel that they are operating the school system adequate for their own children. [Supp. App. at 51-52.]

An assistant attorney general responded. While mentioning potential "due process" and "First Amendment" issues, he concluded that such action was an appropriate step in converting to a "unitary school system in which racial discrimination would be eliminated root and branch." (Supp. App. at 61-62) Shortly after receipt, the board verbally agreed to the policy.

At trial, the board president noted that prior to passage the board was also concerned with "talk" about teachers with children in private school.[8] He further testified that school board members were concerned with frequent newspaper reports of private financial assistance given the academy. (Record, vol. 2, at 24-31)

[8] The record contains no evidence of specific complaints save those made by the "Simpson kids" to their parents. (Record, vol. 2, at 37) Identity of the teachers generating this reaction is unknown.

Two educational psychologists from the University of Mississippi also testified. The first, an assistant professor of guidance and educational psychology, reasoned that a teacher's decision to send his or her child to a private school evinced rejection which would be perceived by students and would act as a "negative social reinforcement"; "anything that detracts from a positive perception of [the] teacher *may* affect learning." (Record, vol. 1, at 121) (Emphasis added.) Reinforcement was described as:

> [A]n operational principle in psychology that holds that a teacher, by such things as paying attention to students, showing respect, trust, acceptance has the *potential* for increasing or having an effect on learning. [Record, vol. 1, at 109. (Emphasis added.)]

The witness further felt that teachers who reject the public school system for their own children would have lower expectations for the children in public schools. Concluding that lower teacher expectations would result in lower student achievement, he found the policy "reasonable." (Record, vol. 1, at 111, 113)

On cross-examination he admitted, however, that he had never made studies of Mississippi schools; not talked to the teachers or students in the Calhoun County system; and, finally, had no first-hand knowledge of the situation in the county. (Record, vol. 1, at 123-24) The witness then expanded his analysis. In his opinion, all state teachers, university professors, and federal employees engaged in school-related activity are under an obligation to send their children to public schools. He also stated that the policy was

reasonable with respect to teachers sending their children to parochial schools. (Record, vol. 1, at 117-120)

The second witness (chairman of the Department of Guidance & Education) relied on an article from the monthly periodical *Psychology Today*.[9] Coupling this with a study he performed in another area of the state (concerning the utilization of positive reinforcements in the classroom), he offered his conclusions with respect to petitioners:

> Well, in my opinion, that would set up a system where other students would perceive *or could perceive* the teacher in a negative way, as not accepting that the public school was a good and viable place for their children to attend. [Record, vol. 1, at 134. (Emphasis added.)]
>
> . . . .
>
> Well, *if* the student is perceiving the teacher as negative and that it is not a viable place for your own children to go, then that would have an effect on the student's achievement, he would not perceive it in a positive way and, therefore, *probably* would not achieve as well.
>
> Q. Would this be a positive effect or detrimental effect?
>
> A. Well, I would say it would be detrimental. *I wouldn't use "detrimental,"* I would probably use something like negative *or just a lack of positive reinforcement.* [Record, vol. 1, at 135. (Emphasis added.)]

[9] Rosenthal, *The Pygmalion Effect Lives*, Sept. 1973 PSYCHOLOGY TODAY 56 (Supp. App. at 36-41). The article reviews a number of studies exploring the effects of lowered teacher expectations on student achievement. It is not based on situations in Calhoun County, nor the issue presented in the present case. Rather, it focuses on consequences which flow from a teacher's perception of students as low achievers.

Finally, this dialogue:

> Q. [D]o you have an opinion as to what the expectation of a teacher would be who would send their child to a private school while teaching in a public school with respect to the expectation of children in the public school?
>
> A. *I wouldn't have an opinion for any particular teacher.* I would have to talk to the specific teacher on that. [Record, vol. 1, at 138. (Emphasis added.)]

On cross-examination his opinions with respect to sending children to parochial school (Record, vol. 1, at 146), and identical limitations with respect to university professors (Record, vol. 1, at 142), coincided with the other psychologist. The basis of his testimony, *i.e.*, no interviews with the teachers or children involved, was also admitted to be identical to that previously given. (Record, vol. 1, at 140-41, 149)

The District Court rejected all First Amendment, Due Process, and Equal Protection claims. This decision was affirmed 2-1; no opinion being agreed upon by the majority. A petition for rehearing en banc was denied 10-5 with Judge Clark writing:

> Respectfully, I insist that the panel decision is (1) contrary to Supreme Court precedent, and (2) an error of exceptional importance. My best effort having been expended in the panel dissent, a further attempt at explanation appears futile. [App. 2a.]

VI.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW DECIDES A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

A. Preliminary Statement

The court of appeals premised its decision on a selective set of facts significantly limiting the constitutional issues fairly raised by the record. This portion of the petition sets forth reasons for granting the writ with the case in the factual posture assumed below. If certiorari is granted, however, it is the intention of petitioners to brief two additional issues not considered:

First, an explicit assumption was made that the action taken was a good faith attempt to eliminate the effects of a segregated school system "root and branch"; concededly a legitimate state interest. The record clearly shows, however, the presence of two "less weighty" factors[10] motivating board action: (1) a feeling that teachers should assume all outward indicia of dedication to the public school system (as set forth in the letter to the Department of Justice); and (2) a desire to curtail the competitive effect of the private academy by denying children of public school teachers access (as shown by the testimony of the board president). In the context of a denial of a fundamental constitutional right, neither factor serves a legitimate state interest. *Pickering* v. *Board of Educ.,* 391 U.S. 563 (absent adverse impact, criticism

[10] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (belief of board that pregnancy regulation should be passed because some children think "teacher may have swallowed a water melon.")

of school programs permissible); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (no legitimate state interest served in curtailing competition by secular or parochial schools). *Cf., San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1.

Second, the board policy, as written and subsequently interpreted by the person designated to carry it out, presents serious overbreadth issues. Although the trial court's action in narrowing the policy (to the facts presented by petitioners) was applauded by the circuit as having "the pragmatic virtue of facing up to the real issue," App. 5a, the approach conflicts with applicable decisions of this Court. Specifically, when a First Amendment exercise is at issue, a party whose activities might constitutionally be restricted benefits when the statute or regulation affecting him is overbroad. *Dombrowski* v. *Pfister,* 380 U.S. 479, 491.

B. Balancing Individual and State Interests

The majority opinions incorporate widely divergent approaches. Judge Coleman begins with *United Public Workers* v. *Mitchell,* 330 U.S. 75, and *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers,* 413 U.S. 458, as authority for dismissing the case "for want of a substantial federal question."[11] App. 9a. Concluding:

> I stand on what the Supreme Court said in [*Adler* v. *Board of Educ.,* 342 U.S. 485] . . . that per-

[11] Were this analysis adopted as a majority opinion, a separate basis for granting the writ would exist: does *Letter Carriers* overrule Pickering v. Board of Educ., 391 U.S. 563, an important question of federal law which has not been, but should be settled by this Court. *Letter Carriers,* of course, incorporates a *Pickering* analysis. *See* 413 U.S. at 564.

> sons employed or seeking employment in public schools have no right *to do so on their own terms,* that to maintain the integrity of public schools as part of an ordered society school authorities have the *right* and the *duty* to screen teachers in a relevant manner, not inconsistent with *basic* civil rights.[12]
>
> . . . I vote to affirm . . . . In so doing I find no necessity to put a "desegregation" gloss on the decision. [App. 12a.]

Judge Roney rejected this approach by noting that *Perry* v. *Sinderman,* 408 U.S. 593, precludes a school board from failing to rehire for an unconstitutional reason. Finding the successful operation of the public school system "seriously challenged" by Calhoun Academy, however, he concluded that "under the circumstances of promoting a unitary school system," the action taken by the Board was constitutional,[13] *albeit*

[12] This aspect of the opinion is in direct conflict with Keyishian v. Board of Regents, 385 U.S. 589, 605-06, where the Court stated: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. . . . It is too late in the day to doubt that [constitutional liberties] may be infringed by the denial of or placing of conditions on a benefit or privilege." *See also* Pickering v. Board of Educ., *supra* note 10 at 568; Perry v. Sinderman, 408 U.S. 593, 597.

[13] Again, were this a majority opinion, a separate ground for granting the writ exists. In limiting the analysis of the policy to the presumed intention (and effect) of furthering the unitary concept, the question is raised of the limits of Green v. County School Bd., 391 U.S. 430, an important question of federal law which has not been, but should be, settled by this Court.

Judge Roney's interpretation of *Green* also presents a conflict in circuits. Viewing petitioners as "symbols" of segregation (a conclusion implicit in Judge Roney's analysis), the Seventh Circuit holds that absent a factual showing of discriminatory effect, *i.e.,* denial of access to a public school's facilities, utilization of con-

not without expressed qualms, *i.e.,* "it would have been preferable for the school board to treat each plaintiff individually." App. 13a-14a.

By emphasizing the sensitivity of the state's interest, both opinions avoid the most critical facet of the case: the constitutional status of the penalized activity. Specifically, in making the personal, private[14] decision to place their children in an educational environment of their own choosing, petitioners exercised a right which, since *Pierce* v. *Society of Sisters,* 268 U.S. 510, has been considered "basic in the structure of our society." *Ginsberg* v. *New York,* 390 U.S. 629, 639. In its present constitutional posture: a fundamental First Amendment right. *Roe* v. *Wade,* 410 U.S. 133, 152-53; *Norwood* v. *Harrison,* 413 U.S. 455, 470 (a form of exercising freedom of association).

federate symbols could not be enjoined. Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970). The Fourth, in Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973), enjoined an administrator from defunding a student newspaper employing blatant racial editorial policies. The termination was pursuant to an assumed obligation to eliminate all vestiges of segregation "root and branch." The court, citing Healy v. James, 408 U.S. 169, held that, absent disruption, the state "may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent." 477 F.2d at 460. *Accord,* Smith v. St. Tammany Parish School Bd., 448 F.2d 414 (5th Cir. 1971) (injunction against display of confederate flag in principal's office; disruption through demonstrations). *But see* Augustus v. School Bd., 507 F.2d 152 (5th Cir. 1975) (utilization of name "Rebels" and confederate battle flag by students a matter to be dealt with initially by school board even though record shows past violence and racial tension).

[14] There is nothing in the record indicating that students or fellow faculty members were aware of petitioners' decision. The absence of such evidence, of course, precludes any *factual* finding with respect to the impact of petitioners' decision in the public schools.

If such choice were made by anyone other than a state employee, the conclusion would follow "that a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice." *Norwood* v. *Harrison, supra* at 461. What is involved, however, is the scope of permissible curtailment of otherwise constitutionally protected activity when the state acts in its role of employer. The Court's only pronouncement on the issue is *Pickering* v. *Board of Educ.*, 391 U.S. 563.

Pickering on review parallels the instant case: termination of a teacher engaging in a non-employment related exercise of a First Amendment right (letter to the editor) which the lower court held that the school board could "reasonably conclude" was "detrimental to the best interests of the schools." 391 U.S. at 567. This Court made an independent, detailed examination of the record [15] in order to determine the existence of actual interference with school operations.[16] Finding that—at best—Pickering's letter had been greeted with "massive apathy and total disbelief," 391 U.S. at 570, the conclusion followed that there was no factual showing that the First Amendment exercise had "in any way impeded [the] proper performance of his daily duties in the classroom or . . . interfered with the reg-

[15] The review spanned five facets of potential harm to the state interest in maintaining an adequate educational environment, only one of which is directly involved in the instant case: proper performance of daily duties in the classroom. See 391 U.S. at 569-73.

[16] The majority opinion rejects the "reasonable conclusion" standard along with the argument that activity such as Pickering's is per se detrimental to school operations. 391 U.S. at 571. To do otherwise would have equated the "board members own interests with that of the schools." *Id.*

ular operation of the schools generally." 391 U.S. at 572-73. Explicit in the Court's analysis is: (1) an awareness of the "enormous variety" of factual situations arising from the teacher-state relationship and the inappropriateness of laying down a general standard; 391 U.S. at 569, and (2) a determination that the extent of the state's ability to penalize a constitutional exercise entails a balancing of the interests of the teacher as a citizen and the state as employer. 391 U.S. at 568.[17]

The decision below ignores *Pickering*. Absent any direct, *factual* evidence that petitioners' decision with respect to their children had *any* impact (or indeed that any of the students were aware of the situation) the resultant alteration of the school environment fails to attain even the status of "massive apathy." [18] Focus must therefore be placed on the conclusiveness of the board's expert testimony and its interplay with the requirement of interference as postulated in *Pickering*.[19] This aspect of the case justifies the grant of certiorari.

[17] The district court recognized the applicability of the balancing test, App. 36a, but inexplicably refused to apply it. Rather, the court cited *Adler* and concluded that teachers cannot work on their own terms. This, and other aspects of the district court decision are discussed in Comment. *Cook* v. *Hudson: The State's Interest in Integration* vs. *the First Amendment Rights of the Public Schoolteacher*, 45 Miss. L.J. 953 (1974).

[18] "Massive ignorance" appears the better term.

[19] In the context of a First Amendment exercise, there are no decisions by this Court holding that expert testimony of the quality found in the instant record (generalized conclusions not based on empirical data gathered from actual experience with the subject matter) may be utilized to curtail the right asserted. Cf., Paris Adult Theatre I v. Slaton, 413 U.S. 49. As recently noted by the California Supreme Court: "Testimony which qualifies as admissible expert or opinion testimony . . . is, of course, perfectly

C. Equal Protection

Although the opinions written by the majority below do not discuss the issue, previous decisions of this Court clearly establish that classifications which impinge upon fundamental constitutional guarantees, must—under the Equal Protection Clause—be not merely rationally related to a valid purpose, but necessary for the achievement of a compelling state interest. *Shapiro* v. *Thompson,* 394 U.S. 618, 634. The board's policy fails if there is a "reasonable [way] to achieve [the goal] with a lesser burden on constitutionally protected activity." *Dunn* v. *Blumstein,* 405 U.S. 330, 343.

The policy deprives all teachers sending their children to the private school of gainful employment on the basis of status, *i.e.,* all teachers within the tainted class now suffer the conclusive presumption of lack of dedication and/or adverse classroom performance. In order to demonstrate that less restrictive means are not available, the state presumably must show that all teachers, through the *singular* act of sending their children to a private, segregated school, are demonstrably incapacitated from maintaining their achieved level of teaching, either because: (a) a significant number of students will perceive a "lack of dedication" and learn less; or (b) minority students will

good evidence. However, *where such testimony is not based upon actual* experience, it has limited utility in justifying a restriction of freedom of expression." Los Angeles Teachers Union v. Los Angeles Bd. of Educ., 71 Cal.2d 551, 455 P.2d 827, 835 n.13, 78 Cal. Rptr. 723 (1960). (Emphasis added.) This court now accepts such testimony to show the reasonableness of a regulation; but not as proof that the public gain to be derived from limiting constitutional exercises outweighs resultant impairment of freedom of expression. *Id.*

perceive the teacher as a "racist" and continue to suffer the adverse effects of a segregated school system.[20] Failing this and absent behavior on the campus or in the classroom establishing a nexus with these conclusions, the only other approach would be a showing that, *in fact,* students will seek out knowledge of the personal and private lives of the teachers and, armed with this knowledge, suffer consequent educational disabilities.

In the complete absence of such proof[21] the policy must fall. Reasonable alternatives are available to

[20] Again, an unanswered question is the conclusiveness to be afforded the expert testimony. Also lurking is the suspicion (implicit in Judge Roney's opinion) that all teachers sending their children to a private school do so for racial reasons. No such evidence exists in the present record. Additionally, any such approach brings into play the denial of a right or privilege solely because of association with an unpopular organization. But, "[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from [public employment]." Keyishian v. Board of Regents, 385 U.S. 589, 606. *Cf.* McCrary v. Runyon, 515 F.2d 1082 (4th Cir.), *petitions for cert. filed,* 44 U.S. L.W. 3098. (U.S. Aug. 12, 1975) (Nos. 75-62; 75-66; 75-278).

[21] Some research in the area tends to suggest that empirically-sound data supporting the state's position cannot be produced. Kenneth Clark concludes: "Although many people continue to believe that teachers have a direct influence on the development of racial attitudes in children, this view is not supported by any substantial body of evidence." K. Clark, PREJUDICE AND YOUR CHILD 31 (2d ed. 1963).

More recently, Christopher Jencks concluded that there is strong evidence that regardless of attitudes and abilities, a teacher has a *de minimus* effect on pupils: "Our research suggests, however, that the character of a school's output depends largely on a single input, namely the characteristics of the entering children. Everything else—the school budget, its policies, the characteristics of the teachers—is either secondary or completely irrelevant." C. Jencks, INEQUALITY 256 (1972).

weed from the school environment those—who through the act of sending their child to a private school—*actually* curtail their ability to teach in a unitary system. These include: utilization of faculty-student evaluations; evaluation of achievement levels of students in petitioners' classes before and after the constitutional exercise; and/or comparing student performance in classes taught by other teachers (outside the tainted class). By not considering the Equal Protection aspects of the case,[22] the lower court decision again conflicts with decisions of this Court; justifying the grant of certiorari.

D. Due Process

In *Cleveland Bd. of Educ.* v. *LaFleur,* 414 U.S. 632, the Court dealt with various regulations requiring teachers to take maternity leave without pay at a predetermined point in the gestation period. The case presented a clear conflict between: (1) the "fundamental character of matters of marriage and family life"; 414 U.S. at 639, and (2) the equally compelling state interest in keeping physically unfit teachers out of the classroom. 414 U.S. at 643.

While noting that "at least some" teachers become physically disabled from effectively performing their

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[22] Presuming that there is room to argue that the board policy only indirectly infringes a protected right or that a fundamental right is not involved (per Judge Coleman and the trial judge) there is support for the proposition that the classification cannot withstand even minimal scrutiny. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (Powell J., concurring). This being true, it stands no chance if intermediate scrutiny is applied. Reed v. Reed, 404 U.S. 71.

duties within the time frame contemplated by the regulations, the Court concluded:

> The mandatory termination provisions . . . surely operate to insulate the classroom from the presence of *potentially* incapacitated pregnant teachers. But the question is whether the rules sweep too broadly . . . . That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary. [414 U.S. at 644. (Emphasis added.)]

A strong, legitimate state interest exists to eliminate teachers whose out-of-school activities actually produce an adverse impact on their job performance. Balanced against this, is the teacher's right to exercise (without direct interference from the state) a family choice to send his child to a school of his own choosing. Potentially within the defined class are some teachers whose constitutional exercise may impede their classroom performance. But in establishing an irrebuttable presumption that all teachers falling within the class impinge the recognized state interest, the policy transgresses the clear holding of *LaFleur, i.e.,* absent a procedure for "individualized determinations," the policy fails to meet due process requirements. *Accord, Stanley* v. *Illinois,* 405 U.S. 645 (irrebuttable presumption that all unmarried

fathers are incompetent to raise their children); *Vlandis* v. *Kline,* 412 U.S. 441 (irrebuttable presumption as applied to residency). The opinions again being in conflict with decisions of this Court; the grant of certiorari is justified.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

In *Pickering,* failure of the state to prove sufficient disruption to establish as a *fact* that employment was more than "tangentially and insubstantially involved," 391 U.S. at 574, led to the granting of full constitutional protection for the right exercised. In this context, no reason existed to apply the test as announced; the balancing of interests. Left unanswered:

(1) The degree of "interference" necessary to counterbalance the exercise of an otherwise protected constitutional right; or

(2) How the factors relating to interference are to be weighed, combined or measured against the interference standard.

After seven years, *Pickering* remains the sole authority for determining the scope of constitutionally protected activity for teachers. In the interim, this Court established and refined the scope of constitutional protection afforded students first enunciated in *Tinker* v. *Des Moines Independent School Dist.,* 393 U.S. 503. Without citation to *Pickering,* the Court prefaced its constitutional analysis with the statement:

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. [393 U.S. at 506.]

And concluded in the style of *Pickering:*

> As we have discussed, the record does not demonstrate any *facts* which might reasonably have led school authorities to forecast *substantial disruption of or material interference with school activities,* and no disturbances or disorders on the school premises in fact occurred. [393 U.S. at 514. (Emphasis added.)]

In *Healy* v. *James,* 408 U.S. 169 (unconstitutional exclusion from campus of SDS chapter), the Court again rejected curtailment of First Amendment activities on the basis of "undifferentiated fear," concluding that in all First Amendment cases a "heavy burden" of proof is placed on school administrators. 408 U.S. at 184. Again, and without citation to *Pickering,*[23] careful review of the record found no "material and substantial" disruption sufficient to curtail First Amendment activity.

If it were clear that *Tinker* and *Healy*[24] refined *Pickering's* broad analysis, the opinions below would —*again*—be in conflict with applicable precedent. *Pickering* dealt with past conduct;[25] *Tinker* and *James*

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[23] Cited with approval, however, were two other teacher cases. *Keyishian* for the proposition that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the government" is an impermissible basis upon which to deny First Amendment rights; Shelton v. Tucker, 364 U.S. 479, for the need for "vigilant protection" of constitutional freedoms in American schools.

[24] *See also* Papish v. Board of Curators, 410 U.S. 667 (*Tinker* analysis applied to student newspaper).

[25] The school board in *Pickering* did allege that the letter "would be disruptive of faculty discipline" and would cause dissension in the school and community. 391 U.S. at 567. This Court, however, focused on the allegation of past harm; the approach being justified by the fact that the board was attempting to dismiss on this basis.

with potential interference with school operations. Sequentially, the instant case fits the latter mold. Termination was effectuated solely on the assumption that the attendance of public school teachers' children at a private academy would, in the future, adversely affect the learning environment of the public school system.[26] Termination was summary and without further inquiry even though there was ample opportunity prior to implementation of the policy, as well as in the interim period predating nonrenewal (the six month period remaining on outstanding contracts), to evaluate the impact of each teacher in order to determine any ascertainable deleterious effect on the school environment. The *only evidence* produced, however, was in the form of testimony couched in general terms, not directed to petitioners or the students involved, and qualified by such terms as "potential," "may," "could," "if," and "probably." Most damning is the conclusion that utilization of the word "detrimental" was erroneous; the applicable definitional phrase being "just a lack of positive reinforcement." As would be expected from the nature of the subject matter, the expert testimony is also flatly contradicted by some national studies on the issue.[27]

[26] Indeed, the board policy contemplated as much since a teacher removing his or her child from the private school was, ipso facto, deemed sufficiently "cleansed" of the taint to continue teaching in the public school. Query the "adverse impact" of a teacher who once sent her children to a private school (which is exactly the posture assumed by those teachers bending to the board's policy).

[27] The *Coleman Report* indicates that there is no significant correlation between perceived teacher attitudes toward integration and the academic achievement of Southern Blacks. 2 COLEMAN REPORT, OFFICE OF EDUC., UNITED STATES DEPT. OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). (Supplemental index). *See* Dyer, *School Factors & Equal Educational Opportunity*, 38 HARV., EDUC. REV. 38, 39 (1968) (table 3a). A more recent study concludes: "There is no evidence that school reform can substantially reduce the extent of cognitive inequality, as measured by . . . tests scores or educational attainment." C. Jencks, INEQUALITY 8 (1972). Earlier opinions to the contrary may be found in Davidson & Land, *Children's Perception of Their Teachers' Feelings Toward Them Related To Self-Perception, School Achievement & Behavior*, 29 J. EXPERIMENTAL EDUC. 107, 112 (1960); S. Koslin, B. Koslin & R. Paragament, *Efficacy of School Integration Policies in Reducing Racial Polarization*, Sept. 1972 at 14 (paper presented at the American Psychological Association, Honolulu, Hawaii).

This evidence obviously fails to meet *Tinker* requirements; it shows a pall of "undifferentiated fear" instead of *specific facts* indicating material and substantial disruption as the sole justification for the policy. After seven years of litigation under *Pickering,* however, the lower courts have reached widely variant results on the *Tinker-Pickering* interplay[28] which, as would be expected after this period of time, produces a clear conflict between circuits and within the circuits themselves.

In *Keckeisen* v. *Independent School Dist.,* 509 F.2d 1062 (8th Cir. 1975), *petition for cert. filed,* 44 U.S. L.W. 3045 (U.S. July 22, 1975) (No. 74-1503), the Eighth Circuit upheld a regulation prohibiting marri-

[28] Both *Pickering* and *Tinker* are grounded in the principle that the state cannot deny constitutional rights through its control of the school system. Both decisions envision the same basis for valid administrative action: interference with school operations. *Pickering,* however, describes guidelines for analyzing the conflicting interests noting situations which *might have* led to a different result if they constituted sufficient interference. The problem is that the "if" was not made sufficiently clear. Thus, under *Pickering,* the possibility arises for courts to find a scintilla of, for instance, "disharmony", and hold for the state. Read with *Tinker,* however, the test of "substantial interference" would not produce such a result.

ages between administrators and teachers. In the absence of any facts showing that the marriage in question *substantially interfered* with one or more of the interests outlined in *Pickering, e.g.,* faculty harmony, the court, utilizing a per se approach, concluded: "[t]he mere existence of the husband-wife/administrator-teacher situation is bound to have a deleterious effect on the morale of the faculty." 509 F.2d at 1066. The failure to couple *Tinker* with *Pickering* is, of course, identical to the technique utilized by the trial judge and one member of the panel below.[29]

The conflicting approach is best demonstrated by the Second Circuit's decision in *James* v. *Board of Educ.,* 461 F.2d 566 (2d Cir.), *cert. denied,* 409 U.S. 1042 (1972).[30] At issue was the dismissal of a teacher for wearing an armband. Rejecting as a basic proposition that students' rights (under *Tinker*) were greater than teachers' rights (under *Pickering*) the court concluded that mere fear of disturbance could not justify

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[29] In a somewhat similar manner, the same Circuit in Birdwell v. Hazelwood School Dist., 491 F.2d 490 (8th Cir. 1974), upheld the dismissal of a teacher whose speech was characterized as a "thinly veiled exhortation to violence." This decision affirmed the district court conclusion that proof of actual disruption was not necessary: "[P]otentially disruptive conduct is sufficient to remove the conduct from protected freedom of expression . . . ." 352 F. Supp., 613, 621 (E.D. Mo. 1972). The Fifth Circuit has utilized an identical approach. *See* Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir., 1972) (speeches to students utilizing profane language, etc.).

[30] *Accord,* Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972), *cert. denied,* 411 U.S. 932 (1973) (absent factual showing of material and substantial disruption, silent refusal by teacher to salute flag not grounds for dismissal).

the restriction and that conclusive evidence was necessary, to-wit:

> Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based on reasonable inferences *flowing from concrete facts and not abstractions,* that the interests of discipline or sound education are *materially and substantially jeopardized* . . . . [461 F.2d at 571. (Emphasis added.)]

On remand, the district court heard evidence from numerous experts testifying for the Board concerning potential disruption. Commenting on this testimony, the court noted (as in the instant case) that they knew nothing about the students or teacher involved, but had, in fact, derived their information about the armband incident from newspapers and discussion with counsel. 385 F.Supp. 209, 213-14 (N.D.N.Y. 1974). Alluding to this testimony and similar testimony by administrators that the teacher's act "might" lead to disruption, the Court found that classes had continued at a "serene pace," and concluded:

> [W]hat is essential for the defendants to carry their burden of proof is some sort of showing of *actual* educational or disciplinary disruption. The defendants have not offered any such proof. Testimony about some vague internal disruptions [*similar to testimony concerning the students in Calhoun County*] or alleged acts of "poor pedagogy" will not suffice. "[*I*]*n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression.*" [385 F.Supp. at 216.]

The approach utilized by the Second Circuit of requiring, under *Tinker,* a factual showing of material

and substantial interference has been utilized by the Tenth,[31] Seventh,[32] Sixth,[33] Fourth,[34] and, as pointed out by the dissent below, in previous decisions of the Fifth.[35] The result is perhaps best described as "judi-

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[31] Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974) (statements at faculty meeting, must show material and substantial interference; First Amendment right outweighs the promotion of efficiency and harmony). *Accord*, Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974) (substantial "disharmony" not shown by personality preferences of college president).

[32] Hostrop v. Board of Junior College Dist. No. 515, 471 F.2d 488, 492 (7th Cir. 1972) (teacher's speech may be regulated "only if a public entity can show that its functions are being substantially impeded by the employee's statements.")

[33] Whitsell v. Southeast Local School Dist., 484 F.2d 1222 (6th Cir. 1973) (support of unauthorized demonstration in gym substantially impeded school operations).

[34] Acanfora v. Bd. of Educ., 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) (no substantial impairment of teaching capacity due to public interviews concerning homosexual beliefs; dismissal based on other grounds).

[35] In Fluker v. Alabama State Bd. of Educ., 441 F.2d 201 (5th Cir. 1971), the court gave what it believed to be a correct reading of *Pickering* and *Tinker:* "[T]he State [has] the burden of justifying its action by showing that the complainant's activities "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Accord*, Smith v. United States, 502 F.2d 512 (5th Cir. 1974) (dismissal of psychologist upheld where it was "clearly demonstrated" that the wearing of a peace pin "substantially" interfered with treatment of patients in a VA hospital.)

The eighth circuit has its own internal conflict. In Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973), the district court refused to uphold the dismissal of a female teacher with intermittent nocturnal visitors where there was no showing that this activity interfered with the school's work; "undifferentiated fear or apprehension . . . is not enough." 346 F. Supp. at 401. The circuit affirmed, concluding that she had not

cial picking and choosing." Dependent upon the subjective approach taken by individual three-judge panels, *Tinker* may or may not be coupled with *Pickering* in order to give substantive protection to teachers. As recently analyzed:

> In light of the confusion surrounding the issue [scope of *Pickering*] it may well be concluded that the Court's next contribution to the development of the First Amendment rights of teachers should be in the form of clarifying the rules it has already established. [Note, *Teachers' Freedom of Expression Outside the Classroom: An Analysis of the Application of Pickering and Tinker,* 8 GA. L. REV. 900, 918 (1974).]
>
> The public employee and school cases since *Pickering* do not, with any degree of consistency, adequately formulate the degree of interference in the goals and operations of public agencies that will be tolerated in the name of first amendment exercise. What is needed is some intelligible expression of the weight to be given to the First Amendment interest in public employee cases. [Comment, *Cook* v. *Hudson, The State's Interest in Integration* vs. *The First Amendment Rights of the Public Schoolteacher,* 45 MISS. L.J. 953, 985 (1974).]

The teachers and school boards of this country deserve more predictable parameters within which each can function. The existing conflict in and between circuits justifies the grant of certiorari.

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been "shown incapable of maintaining discipline in her classes because of any inferences of impropriety drawn by her students or their parents." 476 F.2d at 378. *Accord*, Gieringer v. Center School Dist., 477 F.2d 1164 (8th Cir.), *cert. den.*, 414 U.S. 832 (1973) (no material and substantial disruption arising from speech made at a teacher's meeting).

VII.

CONCLUSION

The decision below sets the constitutional calendar back twenty-five years when communism (not racism) was *the* challenge to America. Comment, *The "Little Red Schoolhouse" and the Communists: New York State Struggles With the Problem of Educating in a Free Society*, 35 CORN. L.Q. 824, 826 (1950).[36] In its best light, it has all the characteristics of "just one more" (for the good of the cause, of course) in the name of integration. This "one more," however, sows the seeds of destruction for individual liberties. It conveys the message to thousands of school board members that the label "integration," like a magic talisman, may be utilized to justify the curtailment of any constitutional exercise by teachers under their control; regardless of the presence or absence of a legitimate state educational goal. In this sense it resembles a lower-court *Gobitis*[37], with the distinct potential of returning the American teacher to the serf-master relationship which has been the posture historically favored by local school boards.[38] Beale, A HISTORY OF

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[36] The trial judge and the Fifth Circuit did not "inadvertently" drop the constitutional ball. *See* Andrews v. Drew Municipal School Dist., 507 F.2d 611 (5th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3044 (U.S. July 22, 1975) (No. 74-1318) (affirming District Judge Keady's decision striking down a school board regulation prohibiting the employment of teachers having illegitimate children).

[37] Minersville School Dist. v. Gobitis, 310 U.S. 586.

[38] Exercise of the *specific power* of terminating teachers due to enrollment of their children in a private school is now statutorily prohibited in Mississippi. Chapter 459, Laws of 1974. Having no retroactive effect, the Fifth Circuit found no need to determine the constitutionality of this measure. App. 5a n. 3. The back-pay claim of petitioners obviously precludes any suggestion of mootness.

FREEDOM OF TEACHING IN AMERICAN SCHOOLS (1941). No matter how viewed, the integrated public school system of Calhoun County, Mississippi has rejected the services of three capable, individualistic, experienced teachers. The stamp of judicial approval: a decision in conflict with precedent of this Court and with decisions of other courts of appeal. The writ must issue.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 74-1038.

BILLY D. COOK, et al., *Plaintiffs-Appellants,*

v.

ROBERT W. HUDSON, etc., et al., *Defendants-Appellees.*

July 3, 1975.

Appeal from the United States District Court for the Northern District of Mississippi; 365 F.Supp. 855.

On Petition for Rehearing and Petition for Rehearing En Banc

(Opinion April 21, 1975, 5 Cir., 1975, 511 F.2d 744)

Before COLEMAN, CLARK and RONEY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also denied.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

CLARK, Circuit Judge, with whom Circuit Judges THORNBERRY, AINSWORTH, SIMPSON and GEE, join (dissenting).

When it appeared my writing would express the views of the panel, particular care was taken to explicate and

document what was said because it seemed absolutely necessary to cogently reinstate the core rights trampled by the school district's arbitrary edict of forced conformity in a citizen's private life. That endeavor failed to muster a concurrence. Now, the full Court, albeit by the narrowest margin possible, has declined to rehear the cause en banc.

Respectfully, I insist that the panel decision is (1) contrary to Supreme Court precedent, and (2) an error of exceptional importance. My best effort having been expended in the panel dissent, a further attempt at explanation appears futile. For the reasons previously stated, I dissent from the court's denial of rehearing en banc.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 74-1038.

BILLY D. COOK, et al., *Plaintiffs-Appellants,*

v.

ROBERT W. HUDSON, etc., et al., *Defendants-Appellees.*

April 21, 1975.

* * * * * * * * * *

Before COLEMAN, CLARK and RONEY, Circuit Judges.

PER CURIAM:

Appellants are three school teachers formerly employed in the Calhoun County, Mississippi public school system. Each was refused reemployment for the 1973-74 school year by the Calhoun County Board of Education pursuant to an unwritten board policy that prohibited the hiring of any teacher whose own children did not attend the public schools. At the time the hiring decision was made, appellants' children were enrolled in the Calhoun Academy, an all-white, secular private school located in Calhoun County.

Pursuant to the policy, defendant Hudson, the principal of the Attendance Center at which plaintiffs taught, did not recommend plaintiffs for renewed teaching contracts for the 1973-74 school year, a prerequisite to reemployment under Mississippi law.[1] The court found that "[t]he sole reason for refusal [to recommend] was that the plaintiffs, otherwise qualified to continue their teaching duties, stated that they could not comply with the Board's policy." Shortly before the opening of the 1973-74 school year, plaintiffs brought this action for reinstatement, back pay and monetary damages, claiming that imposition of the Board's policy violated their First Amendment right to freedom of association and Fourteenth Amendment rights to due process and equal protection. The district court construed the policy to apply only to teachers with children enrolled in the segregated Academy and upheld it as a justified part of the Board's effort 'to eliminate racial discrimination and remove its pervasive influence from the county's public schools." Cook v. Hudson, 365 F.Supp. 855 (N.D. Miss. 1973).

I.

By order dated August 9, 1968, the district court instructed the Calhoun County Board of Education to begin the transition from a dual to a unitary school system. In addition to establishing a timetable for desegregating each grade, the court's order set out guidelines to be used by the school board in making faculty employment decisions during the transition period and thereafter. These guidelines prescribed remedial measures to correct the prior practice of faculty segregation. The court further enjoined the Board to take affirmative steps to eliminate racial discrimination from the public schools and to bring

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[1] Miss. Code Ann. Section 37-9-17 (1972). Mississippi does not provide tenure for public school teachers. *See* Jennings v. Meridan Municipal Separate School Dist., 337 F.Supp. 567 (S.D. Miss. 1971), aff'd, 453 F.2d 413 (5th Cir. 1971).

about a unitary school system within the county. The timetable called for full desegregation of the school system by the 1970-71 school year; no one has suggested that this deadline was not met.

On a factual basis more fully developed in its opinion cited above, the district court found that "Calhoun Academy is a racially discriminatory institution formed in the wake of public school desegregation to provide a haven for segregated education" and that "the dominant, if not sole, reason why each plaintiff enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system." The court also found that prior to the establishment of Calhoun Academy no private school, either religious or secular, had ever existed in the county, and none except the Academy existed at the time the policy was promulgated.

When the Board decided on the challenged policy in November 1972, eight public school teachers had children enrolled in Calhoun Academy. Prompted by the concern that a proper accommodation to the court's desegregation order required a faculty "totally committed to a desegregated school system", and encouraged by a Justice Department letter seemingly approving its proposed action,[2] the Board verbally agreed to this policy:

[2] The letter, signed by an attorney in the Education Section on behalf of an Assistant Attorney General, read in pertinent part as follows:

> Although the Department of Justice is authorized by law to render legal opinions only to the President and the heads of the executive departments, we also have the responsibility to enforce the court orders in this case. Those orders would certainly not preclude the school board from taking the action described in your letter. Indeed, as your letter correctly notes, the court, in its ruling from the bench on August 7, 1968, made several references to the board's obligations to take positive and affirmative steps." As was pointed out by Chief Justice Berger [sic] in McDaniel v. Baressi, 402 U.S. 39, 41 [91 S.Ct. 1287, 28 L.Ed.2d 582] (1972), "school boards that operated dual school systems are charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." See also, Green v. County School Board, 391 U.S. 430, 437-438 [88 S.Ct. 1689, 20 L.Ed.2d 716] (1968).
>
> The comments made above do not purport to answer any "due process" or "First Amendment" issues which may be raised in the matter. We appreciate your interest in writing this Department.

> Prior to the employment of a new teacher, or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi, will be required to attend the public schools of Calhoun County or said teacher will not be employed or reemployed.

Board members testified that although more broadly stated, the policy was fashioned with only Calhoun Academy in mind. In evaluating plaintiffs' constitutional claims, the court below limited its consideration to the policy terms "intended by the board and applied to the plaintiffs", and expressly declined to reach any potential question that might be raised by application of the policy to a teacher whose children attended a racially nondiscriminatory school. 365 F.Supp. at 859-60. The district court's approach of reviewing the policy narrowly as it was intended and applied, rather than broadly as it was adopted, has the pragmatic virtue of facing up to the real issue between the parties and producing a resolution of that issue on its merits now.[3]

[3] In this connection, we note that subsequent to the adoption of this policy and before these teachers were reemployed the State of Mississippi enacted a statute that prohibits school board regulations denying employment or reemployment on the ground of nonenrollment of an eligible child in that public school system. Chapter 459, Laws of 1974. Since none have suggested that the statute should be given retroactive effect, the validity of the statute is not before us.

Although the president of the school board testified that patronage of the Academy by public school teachers had been a source of controversy in the community, the keystone to defendants' justification of the policy (and the district court's approval) came from the testimony of two experts in the field of educational psychology. Both were of the opinion "that the challenged policy was significantly related to a teacher's effectiveness and job performance [because] students in desegregated classes are likely to perceive rejection, and experience a sense of inferiority from a teacher whose own children attend a nearby racially segregated school, and [such students will] be inclined to perform at a lower educational level". 365 F.Supp. at 860. Neither expert had evaluated plaintiffs individually. One had been director of a three-year project the aim of which was "to increase the interaction between the school and the community and the student and the teacher in public schools in Mississippi". His investigation had included schools in Calhoun County, although not the Calhoun City Attendance Center at which plaintiffs taught. Both experts agreed that the Board policy was "reasonable", based on psychological principles of "negative reinforcement" and "teacher expectation". One of them explained:

> A. Okay. The kind of thing that operates in a classroom is that a major variable in learning is how a teacher relates to a student. There is ample indication from both research, my own and others, and just observation on my part that a teacher who is perceived by students as rejecting the public school system will have a difficult time, for example, reinforcing the learning that would go on in the classroom. It would be a perception on the part of students of a difference from the students, and I think this would be particularly true with the black students.
>
> Q. What would be the relationship of this rejection and perception to academic achievement?
>
> A. The major thing is that a teacher is the major—or a major reinforcer of learning. And so that if there

> is a discrepancy in the way that a student—or let's say if there is a negative perception on the part of the student of the teacher, this detracts from the teacher's ability to reinforce learning.
>
> Q. Now, by reinforcement, what are you speaking of in terms of this reinforcement?
>
> A. It's an operational principle in psychology that holds that a teacher, by such things as paying attention to students, showing respect, trust, acceptance has the potential for increasing or having a positive effect on learning.
>
> Q. Is this what—
>
> A. That's basically what reinforcement is.
>
> Q. Is this what educational psychologists would refer to as positive or negative social reinforcement?
>
> A. Right.
>
> Q. And what would be the effect of a negative social reinforcement?
>
> A. The negative social reinforcement is shown in situations where the possibility exists for a teacher not having the potential or the possibility as a functional teacher to reinforce what goes on in an appropriate way in the classroom.
>
> Q. Doctor Eicke, would a student perceive a teacher who sent their own children to a private school—a public school student, would this be perceived as a negative social reinforcement?
>
> A. I think it would.
>
> Q. Doctor Eicke, what do psychologists mean when they refer to teacher expectations?
>
> A. Teacher expectation is an area that has been studied in educational psychology dealing with a phenomenon in which what is expected of students is what they tend to do. And my contention would be that if a teacher expected less from students that the students would tend to perform at a lower level; and conversely, if the teacher expected more, the students would tend to perform better. This need not be a

> conscious kind of thing. In fact, it usually isn't. And I would think that a teacher that rejects the public school system as acceptable for [the teacher's] own children would set lower expectations [for the public school students] that [the teacher] would then come in contact with.

He added that "[a]nything that detracts from a positive perception of [the] teacher may affect learning." The other expert repeated and further explained similar opinions.

The district court found in this evidence a sufficient "rational relation" between the challenged policy and the goal of public school desegregation to answer plaintiffs' equal protection objection. However, while apparently conceding that the Board's policy infringed plaintiffs' First Amendment rights, the court noted that those rights "may not be considered in isolation", that they "must be applied in the light of the special circumstances of the environment of the particular case",[4] and that "where the exercise of First Amendment rights impairs the teacher's effectiveness, or conflicts with the performance of her job, the school board may lawfully refuse to rehire the teacher". After quoting from the Supreme Court's opinion in Adler v. Board of Education,[5] the court concluded:

> It necessarily follows that if the board's policy is a reasonable and constitutional regulation, plaintiffs may not complain of the consequence of not being rehired as public school teachers for having exercised their right to send their children to a private school.

The court evidently implied a finding that the policy was constitutional within its determination that the rational relation test had been met.

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[4] Quoting Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972).

[5] 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952).

The Per Curiam opinion to this point was prepared by Judge CLARK. All members of the Panel concur in it. After extensive conference and individual judicial study of this obviously difficult case, our inability to agree on a unanimous opinion stems from our disagreement as to (1) whether the Judgment of the District Court should be affirmed and (2) the reasons for our individual conclusions. From this point forward the members of the Panel will state their views separately, with the result that the Judgment of the District Court will be affirmed.

SEPARATE VIEWS OF CIRCUIT JUDGE COLEMAN

With deference to the views of my Brothers, I vote to affirm the judgment of the District Court, but for reasons different to those there assigned. Under the authority of United Public Workers v. Mitchell and United States Civil Service Commission v. National Association of Letter Carriers, hereinafter cited, I would have dismissed the case for failure to raise a substantial constitutional question.

Quoting from Mitchell:

> "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we [the Supreme Court] see no constitutional objection."

United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), "unhesitatingly" reaffirmed in United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2280, 37 L.Ed.2d 796 (1973).

In the latter case the Supreme Court held that neither the First Amendment nor any other provision of the Constitution invalidates a law barring the following customary and ordinary First Amendment rights of those not shouldered with the responsibilities of federal employment: (1)

organizing a political party or club, (2) actively participating in fund-raising activities for a partisan candidate or a political party, (3) becoming a partisan candidate for, or campaigning for, an elective public office, (4) actively managing the campaign of a partisan candidate for public office, (5) initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office, and (6) serving as a delegate, alternate or proxy to a political party convention.

> "But, as the Court held in Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees'." 413 U.S. at 564, 93 S.Ct. at 2890.
>
> "There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Ibid.*
>
> "Neither the right to associate nor the right to participate in political activities is absolute in any event [citations omitted]." 413 U.S. at 567, 93 S.Ct. at 2891.

The right of the teacher-appellants to send their children to a private school, whether grounded in the Constitution or not, is not at stake in this appeal. Nobody is contesting their primary right to do so.

No racial bias is involved. The teachers are white.

There is no *Singleton* issue in the failure to re-employ them; this was not a reduction in force prompted by an effort to achieve unitary status.

The teachers did not have tenure.

There is no contention that the school board policy was pretextual or sprang from anything other than complete good faith. It applied to all teachers who had educable children and some of them complied with it.

There is no substantial evidence of the existence of any valid educational factor available at the private school not also available at the public school.

The case then boils down to this:

Under the facts of this case, does the United States Constitution deny a public school board the authority to adopt and uniformly enforce a policy clearly designed, in good faith, to insure the undivided dedication of its teachers (and the appearance of that dedication) to the public school function? Under the authorities above cited, I respond that it does not.

Actually, those of the general public, who pay the taxes, who keep the public school doors open, and who depend on those schools to educate their children, have a right to expect undivided teacher dedication, free of any real or apparent conflicts of interest.

Here, the teacher-appellants seek to defeat that public right by saying that because they have a right to send their children to private schools they also have the constitutionally guaranteed right to be employed in the public schools in defiance of the considered judgment of the school board that such a practice is not good for the schools which they have assumed an obligation to foster and maintain.

I simply do not believe that the Constitution may be stretched so far.

We are not here dealing in isolation with the rights of parents as to the education of their children. This is only a springboard from which teachers (who also happen to be parents) are trying to jump to the desired result. We are confronted with altogether different claims: we are asked to hold as a matter of constitutional law that they may *command* for themselves employment in a public agency in *defiance* of the declared public policy of that agency, a policy which could have no possible purpose other than to promote the unity of, and public confidence in, the public school system. In such a collision of interest, the asserted "parental right" must yied. On balance, concerned as we are with the general, discretionary power of school boards to manage public schools, the board policy should prevail and I see nothing in the Constitution to forbid it.

I stand on what the Supreme Court said in Adler v. Board of Education (1952), hereinabove cited, that persons employed or seeking employment in public schools have no right *to do so on their own terms,* that to maintain the integrity of public schools as part of an ordered society school authorities have the *right* and the *duty* to screen teachers in a relevant manner, not inconsistent with *basic* civil rights.

For these reasons, I vote to affirm the judgment of the District Court. In so doing I find no necessity to put a "desegregation" gloss on the decision.

Separate View of Circuit Judge Roney

We are asked to review a judgment in favor of school authorities who were sued by three former teachers for reinstatement, back pay, and other relief on the ground that the teachers were not rehired for unconstitutional reasons. I would affirm the judgment of the district court

on the particular facts of this case on a very narrow ground.

Mississippi teachers are nontenured. School authorities may refuse to rehire a teacher "without any reason at all." Thompson v. Madison County Board of Education, 476 F.2d 676, 679 (5th Cir. 1973). They may not refuse to rehire them, however, for an unconstitutional reason. Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Plaintiffs held one-year contracts which expired at the end of the school year. They were not discharged. They were, on the other hand, not rehired. The plaintiffs had the burden of proving that the action of the school authorities in failing to rehire them was unconstitutional. I think they failed in such proof. I would rest an affirmance on the findings of fact of the district judge as they apply to these individual plaintiffs.

The court found as a fact that the dominant, if not sole, reason why each plaintiff enrolled his or her children in Calhoun Academy was to avoid the desegregated school system. This finding is not clearly erroneous. The court accepted the evidence that this conduct significantly related to the effectiveness and job performance of the teachers. The successful operation of the public schools as a unitary system under court-ordered desegregation was seriously challenged by the existence and public support of Calhoun Academy. The court found, without dispute, that the failure to rehire these teachers by the school authorities was for no other purpose than to strengthen local support for the public schools and to effectively implement the court-ordered requirement to change from a dual segregated school system to a unitary nondiscriminatory system. Under these circumstances, I would affirm the district court's conclusion that the school authorities acted within their discretionary authority.

Whether similar action would be valid under less compelling circumstances, we need not decide. Although it

would have been preferable for the school board to treat each plaintiff individually, and although the evidence is somewhat general rather than specific, I think that the district court had a sufficient base to apply the general evidence to the individuals. It appears to me it did this in fact, if not by specific language, when it assessed the individual testimony as to the reasons each gave for placing the children in Calhoun Academy. I would not get to the question of the validity of the general policy unrelated to this specific case of court-ordered desegregation. This case, to me, does not have broad implications.

CLARK, Circuit Judge (dissenting).[1]

I.

Plaintiffs claim that the challenged policy infringes their personal freedom as parents to choose the academic environment in which their children will be educated. This right received explicit judicial recognition in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), where it was expressed as "the liberty of parents and guardians to direct the upbringing and education of children under their control," and has been repeatedly reaffirmed since as one of several "fundamental" rights falling within the constitutional guarantee of personal privacy. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Whether viewed as a part of a citizen's Fourteenth Amendment liberty or First Amendment freedom of association or a combination of both, the right plaintiffs' claim is protected from state in-

[1] As the explanation following the statement of facts indicates, the text of these dissenting views was originally prepared as a proposed majority opinion to reverse the judgment of the district court.

trusion by the Due Process Clause of the Fourteenth Amendment.[2]

As a fundamental right, the prerogative of parents to direct their children's education supersedes the state's more generalized interest in the public school system, and sustains the corollary freedom of private schools to exist and operate. "[A] State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parent's choice." Norwood v. Harrison, 413 U.S. 455, 461, 93 S.Ct. 2804, 2808, 37 L.Ed.2d 723, 729 (1973). This right exists without regard to the parents' motives for choosing private over public education, or the popularity or social utility of the private school's *raison d'etre*. *See* NAACP v. Button, 371 U.S. 415, 88 S.Ct. 328, 9 L.Ed.2d 405 (1963).

The scope of this parental right is not without limit, however. An accommodation must be reached whenever its exercise conflicts with the state's interest in maintaining the general public welfare. "The parent cannot assert an absolute freedom to remove his child from all schooling, or to send him to a school where the curriculum includes not only mathematics but also the desirability and techniques of immediate violent overthrow of the government." Green v. Connally, 330 F.Supp. 1150, 1167 (D.D.C.), aff'd sub nom. Coit v. Green, 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971). To be sustained, an accommodation that in-

[2] *Compare* Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (right of privacy founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action) *with* Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) ("By Pierce v. Society of Sisters, *supra*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments") *and* Green v. Connally, 330 F.Supp. 1150 (D.D.C.1971) (freedom of association supports the right to educate child in the school of the parent's choice).

fringes upon this parental right must be tested against certain well-established principles. "Where certain fundamental rights are involved, the court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, *supra,* 410 U.S. at 155, 93 S.Ct. at 728, 35 L.Ed.2d at 178 (citations omitted); *see* Griswold v. Connecticut, *supra;* Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). A statutory classification that infringes upon fundamental freedoms must be not merely rationally related to a valid public purpose, but must be *necessary* to the achievement of a compelling state interest. Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

The state cannot avoid this scrutiny by offering the discredited dogma of Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952), that public employment which may be denied altogether may be conditioned upon the surrender of constitutional rights. That theory died aborning, *see* Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); and was recently retrenched in Perry v. Sindermann, 408 U.S. 593, 93 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Nevertheless, teachers occupy a unique position as the instruments by which the state delivers vital educational services to public school pupils. Because of this, their personal constitutional rights will often come in conflict with legitimate competing interests of the school boards who employ them. The task of the teacher is one of such sensitivity and public involvement as to justify employer evaluation on the basis of conduct both in and out of the classroom, Beilan v. Board of Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414 (1958), and to sustain state inquiry into associational activity beyond that which would be proper as to the ordinary citizen or employee. Shelton v. Tucker, 364 U.S. 479, 81

S.Ct. 247, 5 L.Ed.2d 231 (1960); Battle v. Mulholland, 439 F.2d 321 (5th Cir. 1971). While "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," it remains equally true that "First Amendment rights [must be] applied in light of the special characteristics of the school environment." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969).

That the Board's policy imposes a substantial burden upon the exercise of a fundamental right is clear. Equally clear, however, is the legitimacy of the interest claimed by the Board and found by the court to be served by the policy, *i.e.,* the elimination of racial discrimination and its "pervasive influence" from the public schools.

> There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. That government interest is dominant over other constitutional interests to the extent that there is complete and unavoidable conflict.

Green v. Connally, *supra,* 330 F.Supp. at 1167 (footnotes omitted). If this language be broadly interpreted and literally applied, the personal freedoms of public employees could be curtailed by any governmental action that remotely furthers "the interdiction of racial discrimination." The footnote to the final sentence quoted above provides the crucial limitation: "Where there is a compelling government interest even First Amendment freedoms may be limited by *appropriately confined lesser measures* although they could not be prohibited directly." 330 F.Supp. at 1167 n. 36, *citing* Shelton v. Tucker, *supra* (emphasis added).

When legitimate governmental concerns are expressed in legislation that clearly conflicts with the exercise of a fundamental right, the validity of the means chosen must turn on the precision with which the government can identify the unprotected conduct. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, *supra,* 364 U.S. at 488, 81 S.Ct. at 252, 5 L.Ed.2d at 237 (footnote omitted); *see* United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed. 2d 508 (1967); NAACP v. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964); Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971).

The two psychologists provided the only possible link between the policy of requiring the children of public school teachers to attend the public schools and the Board's legitimate interest in providing an equal educational opportunity to all its students. Their testimony indicates that an objectionable effect in the classroom could result from student perception of the teacher as being uncommitted to desegregated public schools. The student who so perceives the teacher, whatever that teacher's actual belief, will "perceive rejection, and experience a sense of inferiority, . . . and be inclined to perform at a lower educational level."

Even accepting the existence of a significant depressant effect on a child's ability to learn, from a teacher who does not appear to support desegregated education, there would remain a serious question regarding the accuracy of the further necessary presumption that all teachers who send their children to segregated private schools convey the debilitating image. Certainly it must be conceded that many valid reasons abound for choosing private over public education—reasons which would retain their validity in the context of court ordered desegregation, and can be understood and appreciated by adult and child alike to have legitimate, non-racial bases. Obviously too, a student who is aware of legitimate reasons for the decision will not perceive the teacher as antipathetic and should not suffer any adverse effect.

It is more important, however, to recognize that a teacher's effectiveness in the classroom is a complex composite of variable elements, no one of which universally will determine academic success. One of the experts here indicated that "reinforcement," the relevant psychological principle, was affected by many factors, such as "paying attention to students, showing respect, trust, acceptance." Doubtless, he left many more unlisted. A teacher who is perceived by her students to reject the viability of desegregated education may have other strengths and abilities that more than compensate for the one negative factor and enable her to provide "positive reinforcement" to her students and to remain an effective classroom performer. The presence of such teachers in the public schools in no way interferes with the Board's duty to offer a non-discriminatory education, and no legitimate governmental interest would be served either by the teachers' compliance with the policy or their exclusion for noncompliance.

I find equally doubtful the apparent assumption that compliance with the policy will dissipate the harmful perceptions that are said to justify its application. To the extent the impermissible influences at which the policy is aimed result from the teacher's actual attitudes and beliefs, as in the case of "teacher expectations," the choice of schooling for the teacher's own children is no more than one evidence of an underlying bias. Unlike the impairment of the teacher's ability to reinforce learning that results from the students' perception (or misperception) of the teacher, the harm that results from the teacher's perception of the student has not been shown to be remediable simply by removing this single appearance of disloyalty. Can a teacher's achievement expectations of the students in her classroom

be expected to change after the enforced enrollment of her own children in the same school system, particularly if the discrepant expectations have a racial basis?

The fit between the Board's policy and the governmental interest it is alleged to serve is thus highly imperfect: it excludes from the public schools teachers who do not possess the characteristics that underlie its premises but who are unwilling to abide by its terms, while it permits to remain teachers who possess racial attitudes of much greater disadvantage to their students. Whatever actual benefits may accrue to the school system by operation of the policy will be as much by coincidence as by design. The reason for this is plain. The Board has incorrectly singled out a teacher's decision to send his or her own children to private school as an infallible indicator of an undesirable classroom effect that it has a legitimate interest in removing. Because of this, the policy acts arbitrarily to deny a fundamental right to public school teachers and therefore cannot be upheld.

Of course a school board should be free to dismiss any teacher whose personal beliefs and actions substantially impede effective classroom performance. This public employer is completely on a par with the private employer in the ability to require that job performance take precedence over an employee's private life. The Constitution requires, however, that if a determination of unfitness is to be made from a presumption based on protected activity, that activity must be conclusively shown to evidence a harmful trait. The expert testimony falls far short of establishing as "necessarily or universally true in fact" the presumption of an impermissible classroom effect. Then too, the Board has a reasonable alternative means of making the determination as part of its evaluation of each teacher's performance. In these circumstances, the Board's overbroad employment policy should be stricken as violative of the Due Process Clause of the Fourteenth Amendment. *See*

Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1973).

II.

After upholding the constitutionality of the policy, the court below went on to reject plaintiffs' procedural due process claims, holding that whatever entitlement plaintiffs might have to a hearing before the Board prior to termination had been satisfied by its judicial proceedings. *See* Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). Thus, review of the court's decision cannot end on a determination that the policy cannot stand as a *per se* rule. Scrutiny must be made of the court's implicit finding that the premises underlying the policy correctly identified valid, constitutional reasons for the dismissal of these plaintiffs as individuals.

To sustain a determination of unfitness on the basis of protected activity, the governmental interest to be served must outweigh the infringement of personal liberty, viewed in the special environment of the schoolroom. "The problem in any case is to arrive at a balance between the interests of a teacher, as a citizen, in [the exercise of a fundamental right,] and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811, 817 (1968); *see* Ferguson v. Thomas, *supra;* Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969). Despite acknowledging the applicability of the *Pickering* balancing of interests test to the refusal to rehire these teachers, the district court apparently accepted the Board's argument that the interest in ending discrimination, in and of itself, ordained the result. No values were assigned to the teachers' rights, nor was any method of balancing the

competing interests defined. Rather, the court concluded that since the Board's policy was "based upon logic that is readily discernible" and "adopted in keeping with the command of the Fourteenth Amendment and the desegregation order of this court," it should be enforced. By thus assaying only one of the competing interests at stake, the court cast the balance irretrievably in the Board's favor. This disposition does not represent the careful weighing of constitutional values that *Pickering* commands.

Defendants claim that the challenged policy furthers five legitimate governmental interests: (1) the compelling interest in meaningful public education; (2) the assurance of complete and total support, loyalty and dedication of the public school teachers in Calhoun County to the public school system and its duties; (3) the elimination of an improper influence on the educational process of the public schools of Calhoun County; (4) the maintenance of appropriate classroom effectiveness and performance of its teachers; and (5) the affirmative duty of the Calhoun County public school officials to eliminate racial discrimination from the public schools. It is in this last listed interest that majority and the court below find the mandate to override the personal rights of public employees. No part of the earlier desegregation order literally commanded the Board to adopt the policy. Nevertheless, defendants claim that the action was both required and justified by the court order to bring about a unitary school system and the Supreme Court decisions interpreting *Brown II*[3] to require comprehensive efforts to remove all vestiges of racial discrimination from the public schools.

In support of this contention, defendants draw principally on Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). In *Green*, the Court held

[3] Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

that, under *Brown II*, "school boards . . . then operating state-compelled dual systems were nevertheless clearly charged with the *affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.*" *Id.* at 437-38, 88 S.Ct. at 1694, 20 L.Ed.2d at 723 (emphasis added). This duty includes the desegregation of faculty and staff of the public schools, "not because of teachers' employment rights, but because students are entitled to a nonracial education, and the assignment of teachers to students on the basis of race denies students that right." Lee v. Macon County Board of Education, 267 F.Supp. 458 (M.D.Ala.1967); *see* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); Rogers v. Paul, 382 U.S. 198, 86 S.Ct. 358, 15 L.Ed.2d 265 (1965). Specific guidelines for the satisfaction of the *Brown II* mandate with respect to student body and faculty desegregation in individual schools have been developed on a case-by-case basis. *See, e.g.,* United States v. Jefferson County Board of Education, 380 F.2d 385 (5th Cir. 1967), cert. denied *sub nom.* Board of Education of City of Bessemer v. United States, 389 U.S. 840, 88 S.Ct. 77, 19 L.Ed.2d 104 (1967); Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1970); *see generally* Swann v. Charlotte-Mecklenburg Board of Education, *supra,* 402 U.S. at 18, 91 S.Ct. at 1277, 28 L.Ed. 2d at 567. Other decisions have emphasized that a school board "is not only under an obligation not to foster discrimination, but to affirmatively eliminate impediments to a unitary system of education." Augustus v. School Board of Escambia County, 361 F.Supp. 383, 387 (N.D.Fla.1973), modified and remanded, 507 F.2d 152 (5th Cir. 1975).

In matters which directly involve the classroom, a school board's interest in maintaining the quality of its educational offering weighs far heavier than the teacher's right to insist upon the exercise of personal freedoms and liberty. Restraints upon individual expression in or about the school

that conflicts with the board's constitutional duties are justifiable. For example, in Smith v. St. Tammany Parish School Board, 316 F.Supp. 1174 (E.D.La.1970), aff'd, 448 F.2d 414 (5th Cir. 1971), the court banned the display of Confederate flags and banners in the schools "expressing the school board's or its employees' desire to maintain segregrated schools" noting that "[n]ot only is the school board to operate a unitary system but the system must be racially non-discriminatory. . . . The retention of Confederate flags in a unitary school system is no way to eliminate racial discrimination 'root and branch' from the system." 316 F.Supp. at 1176; *see also* Augustus v. School Board of Escambia County, *supra*.

Only one case in this circuit has interpreted a school board's affirmative duty to eliminate discrimination to require the board's consideration of a teacher's personal racial attitudes in making employment decisions. In United States v. Indianola Municipal Separate School District, 410 F.2d 626 (5th Cir. 1969), this court reversed the district court's approval of a school desegregation plan that, *inter alia*, failed to make adequate provision for faculty integration. Noting that no black teachers taught at either "white" school and only one white teacher taught, for a half-day each week, at only one of the two "black" schools, the court held:

> The school board must *actively seek out* qualified instructors who are willing to teach children of any color. The voluntary approach is demonstrably not adequate, and the school board must do everything within its power to recruit and reassign teachers so as to provide for a substantial degree of faculty integration. . . . We agree that the school board *must* withhold approval of teacher contracts if that is necessary to achieve more racially balanced faculties. "The board's responsibility is not optional: It must withhold approval of contracts if necessary to achieve faculty desegrega-

> tion." United States v. Greenwood Municipal Separate School District, [406 F.2d 1086 (5th Cir. 1969)] 406 F.2d at 1094.

410 F.2d at 630 (emphasis in original). *Indianola* basically relates to the board's duty to employ personnel whose race can accomplish the numerical desegregation of the teacher corps of a formerly dual school system. An obvious incident of this duty was the recruitment of black teachers willing to teach white children and white teachers willing to teach black children. The only articulated limitation upon personal attitudes is a willingness to instruct children of any race—a condition that is so intimately job-related as to make discussion of its impact upon classroom performance unnecessary.

While the decisions of this circuit as well as of the Supreme Court clearly establish the primacy of the duty to eliminate racial discrimination from the public schools, they cannot establish that in a particular case the exercise of fundamental rights actually impinges upon the educational process. It is the degree to which the respective interests are shown to unavoidably conflict that enables essentially intangible rights to be "balanced." I reject the notion that the desegregation order or judicial precedents obviate application of the *Pickering* test in these circumstances.

As demonstrated in Part I of this dissent, the only evidence that employment of these teachers would frustrate the Board's efforts to provide a non-discriminatory education was altogether abstract. While no prior similar cases have dealt with precisely the kind of subtle psychological effect asserted here, they have uniformly required a showing of more than a speculative inference that constitutionally protected activity could interfere with a state interest. Tinker v. Des Moines Independent Community School District, *supra*, concerned the exercise of personal rights by students rather than teachers, but we have inter-

preted its tenets as equally applicable to the regulation by school boards of both. *See, e.g.,* Fluker v. Alabama State Board of Education, 441 F.2d 201 (5th Cir. 1971); Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969). In *Tinker,* the school board had forbidden the wearing of black armbands by students while on school facilities. The Supreme Court, drawing from the Fifth Circuit decision in Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), held that in the absence of a reason to forecast substantial disruption or material interference with school activities, the regulation impermissibly infringed the students' right to freedom of expression. In James v. Board of Education of Central District No. 1, etc., 461 F.2d 566 (2d Cir.), cert. denied, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 491 (1972), the Second Circuit confronted a situation identical to *Tinker* except that it was a teacher, not a student, who sought to wear a black armband in class to protest war. As in *Tinker,* the court found insufficient evidence of actual disruption to justify the infringement of freedom of speech. "Although we can imagine situations in which a teacher would be so controversial because of his tenets or beliefs that he would be a disruptive force in the school, no one would suggest that he could be dismissed merely because he was *identified* with a particular cause if he did not preach that cause in class." 461 F.2d at 572, n. 13. *James* did, however, point out that there was no "suggestion whatsoever that his armband interfered with his teaching functions, or, for that matter, that his teaching ever had been deficient in any respect." 461 F.2d at 574-75 (footnote omitted).

In Smith v. United States, 502 F.2d 512 (5th Cir. 1974), this court adopted the standard of material and substantial interference to test claims of arbitrary action by a public employer.

> When a government employee asserts that his rights have been unconstitutionally infringed, it is necessary to strike a balance between the interests of the em-

> ployee as a citizen and the interests of the government in promoting the efficiency of the services it performs through its employees. In striking that balance in the context of the First Amendment guaranty of freedom of speech, we feel that the standard of material and substantial interference is the standard to apply. In order for the government to constitutionally remove an employee from government service for exercising the right of free speech, it is incumbent upon it to clearly demonstrate that the employee's conduct substantially and materially interferes with the discharge of duties and responsibilities inherent in such employment. Battle v. Mulholland, 439 F.2d 321 (5th Cir. 1971).

502 F.2d at 516-17.[4] The plaintiff-appellant in *Smith* was a clinical psychologist at a Veterans' Administration hospital who was discharged after repeated requests by his supervisor that he cease to wear a "peace pin" *while on duty.* In upholding his discharge, we found the evidence sufficient to establish "that the wearing of the peace pin . . . while on duty resulted in a material and substantial interference with the performance of his duties as a staff psychologist charged with the duty of administering psychotherapeutic treatment to emotionally disturbed veteran patients." The need for a demonstration of material and substantial interference with actual job performance would seem to be at least as great here. The alleged interference in today's case results not from the teachers' conduct while in the classroom or about the school, but from the uncontrollable and possibly groundless perceptions of others that might result from their knowledge of a personal family decision which in itself was wholly unrelated to the job.

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[4] *Cf.* Doherty v. Wilson, 356 F.Supp. 35 (M.D.Ga.1973) ("A school board may fire, refuse to rehire or refuse to hire a teacher who has exercised constitutionally protected rights in such a manner as to seriously impair or destroy her effectiveness as a teacher.").

Elimination of racial discrimination, and its effect on developing attitudes and values, from public education is judicially established as a constitutional mandate. However, the evidence in this record establishes no more than that one facet of these teachers' private lives carrys a potential to instill a negative value into the relationship between teachers and their students. The proof does not disclose that the impact of this negative force is so debilitating that these teachers' ability to contribute to the advancement of quality education in a unitary system would be overborne in every case or indeed in any one of their cases, or that the students of these teachers will derive from the knowledge of this fact feelings of rejection so deep that no effort the teachers may put into their work can overcome them. The failure of the evidence to demonstrate that their protected activity would substantially and materially interfere with the discharge of their teaching duties and responsibilities should have brought the balance down on the teachers' side.

It is clear to me that the school's policy is unconstitutionally overbroad. It was not shown to form a proper basis for the defendant's decision not to offer reemployment to any one of these plaintiffs individually. The decree appealed from ought to have been reversed for a school board determination of each plaintiff's case, free from the unconstitutional constraint of the school board policy. Today's case is cast in the appealing garb of reinforcing public school desegregation by suppressing the right to educate one's child in a segregated private school. The problem is that the decisional principle it establishes applies to all forms of personal associations from the Ku Klux Klan to Black Panthers, and from membership in the Citizens Counsel to membership in the NAACP. Another such victory, bought at the expense of surrendering constitutionally protected rights to the expertise of psychological opinion, and we are undone.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-1038

D.C. Docket No. WC-73-65-K

BILLY D. COOK, ET AL., *Plaintiffs-Appellants,*

v.

ROBERT W. HUDSON, Etc., ET AL., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Mississippi

Before COLEMAN, CLARK and RONEY, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 21, 1975

COLEMAN and RONEY, Circuit Judges, filed separate opinions setting forth their respective views.

CLARK, Circuit Judge, dissenting.

Issued as Mandate:

UNITED STATES DISTRICT COURT,
N. D. MISSISSIPPI, W. D.

No. WC-73-65-K.

BILLY D. COOK, et al., *Plaintiffs*,

v.

ROBERT W. HUDSON, et al., *Defendants*.

Nov. 1, 1973.

* * * * * * * * * *

Memorandum Opinion

KEADY, Chief Judge.

In this § 1983 case, the plaintiffs, Billy D. Cook, Loula Juanita Milton Adams and Mrs. W. P. Wright, formerly employed as teachers at the Calhoun City Attendance Center, sue the Board of Education of Calhoun County, Mississippi, the County Superintendent of Education and the school principal for reinstatement, back pay and other relief. Claiming that they were unconstitutionally discharged, plaintiffs invoke federal court jurisdiction under 28 U.S.C. § 1343(3). The cause was initially set for hearing on plaintiffs' motion for preliminary injunction; however, the parties consenting thereto, trial of the action on the merits was advanced and consolidated with the preliminary hearing. Following the presentation of evidence at two separate hearings and submissions of briefs by counsel, the case is now ripe for final decision.

Certain background facts provide the setting for the present controversy. On August 9, 1968, this court entered an order terminating the dual school system previously existing in the public schools of Calhoun County which had proved to be ineffective under freedom of choice and directed immediate desegregation. By the order in United States of America v. Calhoun County Board of Education, No. WC- 6637, pupils in the first three grades were assigned to county schools in accordance with geographic zones for the 1968-69 school year; and pupils in grades 4, 5 and 6 were so assigned the next school year, 1969-70, coincident with the desegregation of the upper six grades subsequently ordered. Entering a standard *Singleton*-type decree with respect to faculty, staff, transportation and other services activities and facilities, the court enjoined the board to take affirmative steps to eliminate racial discrimination from the public schools and to bring about a unitary school system within the county.

At the time of the court order, no private school, either religious or secular, had ever existed in Calhoun County. Within one month thereafter, local citizens formed the Calhoun Educational Foundation Corporation, organized to establish and operate Calhoun Academy, a secular private school which from its beginning has been attended by an all-white student body and served by an all-white faculty and staff.

When first established, Calhoun Academy was located about six miles south of Calhoun City, and originally provided the first three grades for elementary students who, except for desegregation, would have attended public school at Calhoun City. Subsequently, the school employed D. L. Harrison, former public school principal, as headmaster. The Academy has sinced moved to a new location north of Calhoun City; the school has added six more grades and enjoys significant support of certain citizens and local organizations, notably the local chapter of the Citizens Council, interested in maintaining a racially segregated education program. Calhoun Academy, because of its failure to adopt racially nondiscriminatory admission policies satisfactory to Internal Revenue Service, no longer has tax exempt status under § 501(c)(3) of the Internal Revenue Code,[1] nor has the school, though initially sup-

[1] Green v. Connally, 330 F.Supp. 1150 (D.C.D.C.1971, 3-judge), aff'd sub nom Coit v Green, 404 U.S. 997 92 S.Ct. 564, 30 L.Ed.2d 550 (1971); and affidavit filed therein of Commissioner of Internal

plied with state-owned textbooks, qualified to continue receiving such textbooks pursuant to this court's order implementing the Supreme Court's decision in Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973). It is inescapably clear that Calhoun Academy is a racially discriminatory institution formed in the wake of public school desegregation to provide a haven for segregated education.

In November 1972 the school board, acting upon the recommendation of its attorney, the superintendent and other school officials, verbally adopted a policy which, though never reduced to writing, is agreed to provide as follows: "Prior to the employment of a new teacher, or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun City, Mississippi, would be required to attend the public schools of said Calhoun County, or said teachers would not be employed or reemployed." The evidence establishes that although stated in general terms, the policy was adopted only with Calhoun Academy in mind, as that institution still remained the only private school within a county where parochial or religious schools had never existed.

In November 1972, the children of 8 public school teachers were enrolled in the Academy; and its student body was wholly composed of white children residing in the county. Although informally adopted, the board's policy was nevertheless made known to the teaching staff without delay; it was freely discussed among the teachers who understood it would become effective at the beginning of the next school year. The board did not expressly provide that any teacher affected by its policy would be granted a

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Revenue on September, 30 1970, revoking advanced assurance of deductibility as to 9 private schools, including Calhoun Academy; Internal Revenue Bulletin No. 1971-12 dated March 22, 1971; letter dated July 3, 1973, from District Director of Internal Revenue to W. A. Matthews, Mississippi Text Book Purchasing Board.

hearing; and no teacher, including the plaintiffs, ever requested a hearing, or was refused one by the board.

When new teacher contracts were being made in April-May 1973, Roger W. Hudson,[2] principal of the Calhoun City Attendance Center, refused to recommend the plaintiffs for teaching positions on his faculty. The sole reason for refusal was that the plaintiffs, otherwise qualified to continue their teaching duties, stated that they could not comply with the board's policy, and concededly they have not done so. It is undisputed that plaintiffs were informed that the failure to comply with the board's policy would preclude their reemployment, but plaintiffs, unlike some other teachers in the system, elected not to comply and preferred to send, or continue sending, their children to Calhoun Academy. Each plaintiff testified at the hearing.

Billy D. Cook, a high school, teacher with 5 years' experience in the Calhoun public schools, enrolled his two children, ages 7 and 5, in the private academy, in, a belief that it provided "a calmer environment" for them and insured against his showing them "natural partiality of a parent" while attending public school. Ms. Adams, who had taught two years at the Calhoun City Attendance Center, enrolled her two small children in the private school, deeming them to be better off in "a calmer situation" where they would receive more individual attention and be exposed to daily devotions, including the reading of Bible stories. One of Ms. Adams' children had a speech defect or difficulty which she stated influenced her decision although a speech therapist was employed at the public school but not at the private academy. Ms. Adams, like Mr. Cook, was a Baptist and conceded that the Academy was a secular and not a religious school. Ms. Wright, a Methodist, had taught six years as a home economics teacher in the Calhoun County public schools. Her two children, ages 10 and 7,

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[2] Erroneously sued as Robert W. Hudson.

had attended the private school for several years when the board's policy was announced. Her reasons for so enrolling them were of a similar nature, as she preferred for her children the smaller class groupings and exposure to Bible studies and devotional exercises. Moreover, Ms. Wright found that the Academy was of greater convenience for her children to attend than the public school since it was within walking distance of the family residence. Ms. Wright had withdrawn her older child from the public school the first year of desegregation, had devoted considerable time to promoting the private school, and acknowledged that she was not totally committed to a desegregated public school system. Each plaintiff's testimony was, on cross-examination, substantially impeached as to the underlying cause for the decision to patronize the private school. The court concludes, as a fact, that the dominant, if not sole, reason why each plaintiff enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system.

Plaintiffs challenge the constitutionality of the board's policy on several alternative grounds, which may be summarized as follows: (1) The policy violates First Amendment rights they have as parents to send their children to a school of their choice in the exercise of freedom of association and freedom of religion; (2) The policy, applicable on its face to all private schools of every description, is both impermissively broad and indiscriminate and also an unreasonable and arbitrary classification, thus offending and Equal Protection and Due Process Clauses of the Fourteenth Amendment; and (3) The policy further contravenes the procedural due process rights safeguarded by the Fourteenth Amendment since it failed to provide plaintiffs with a hearing before the school board and a reasonable opportunity to present their individual grounds for not complying with the blanket policy before being terminated as teachers in the public school system.

Defendants, denying the foregoing contentions, claim that plaintiffs have no viable First Amendment rights in expecting or seeking continued employment in the public schools of Calhoun County, that the board's policy, as applied to plaintiffs whose children attend a racially discriminatory private school, is a reasonable regulation by any standard of equal protection review, and finally, that plaintiffs, being non-tenured teachers without more than an expectancy of reemployment, had no due process rights to a hearing prior to not being offered new contracts of employment, or, if such right did exist, their claims in this regard are now properly before the court for determination after full hearing, and plaintiffs have failed to show substantial grounds for exemption under the board's policy.

While the board's policy may be novel and one not heretofore judicially ruled upon, we are of the opinion that the case is controlled by familiar principles of constitutional law and the policy should be upheld as applied to the facts of this particular case. No relief can be granted to the plaintiffs.

[1-4] Plaintiffs rely, primarily, upon the constitutional right as parents to send their children to the school of their choice, in accordance with the First Amendment "freedom of association" right vouchsafed to them by Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); and Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and assert that under Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), they cannot be required to forfeit these First Amendment privacy rights as a condition of further public school employment. The Supreme Court cases upon which plaintiffs rely are, in our view, both factually and legally distinguishable and do not sustain them in the present factual setting. Conceding

there must be clear justification for curtailing or limiting First Amendment rights, nevertheless, plaintiffs' rights as parents may not be considered in isolation, and to the exclusion of other constitutional demands of equal, if not greater, magnitude. "As no constitutional guaranty enjoys preference, so none should suffer subordination or deletion." Ulmann v. U.S., 350 U.S. 422, 76 S.Ct. 497, 100 L. Ed. 511 (1956). The instant case, at first blush, may appear to present a choice between competing values that might be urged under the First Amendment and what is done infulfillment of the Fourteenth Amendment. As *Pickering* makes clear, courts must "arrive at a balance between the interest of a teacher, as a citizen [in the exercise of First Amendment rights], and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568, 88 S.Ct. at 1734. Thus, First Amendment rights must be applied "in the light of the special characteristics of the environment of the particular case," Clark v. Holmes, 474 F.2d 928, 931 (7 Cir. 1972); Tinker v. Des Moines Independent School District, 393 U.S. 503, 89 S.Ct. 733, 506, 21 L.Ed.2d 731 (1969); and where the exercise of First Amendment rights impairs the teacher's effectiveness, or conflicts with the performance of his job, the school board may lawfully refuse to rehire the teacher. Cf. Cole v. Choctaw County Board of Education, 471 F.2d 777 (5 Cir. 1973). The Supreme Court succinctly stated in Adler v. Board of Education, 342 U.S. 485, 492, 72 S.Ct. 380, 384, 96 L.Ed. 517, 524 (1952):

> "[Teachers] have no right to work for the State in the school system on their own terms. . . . They may work for the school system upon the reasonable terms laid down by the proper authorities. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."

It necessarily follows that if the board's policy is a reasonable and constitutional regulation, plaintiffs may not complain of the consequence of not being rehired as public school teachers for having exercised their right to send their children to a private school.

The validity of the board's policy presents a more serious issue since it applies, literally, to all private schools of every description and regardless of particular circumstances that might motivate parental desire for private, and not public, schooling. Yet the undisputed proof shows that the school board, the plaintiffs and the local community understood that the regulation was adopted, and has been applied, only as to public school teachers who patronize the racially discriminatory private school at Calhoun City. We express no opinion as to whether the policy might validly extend to teachers sending their children to schools which do not foster racial discrimination but are specially designed for physically handicapped or mentally retarded children or offer other specialized training not in general competition with the public school system. Since private schools of that nature are not attended by plaintiffs' children, they cut no figure in this case. We, therefore, construe the policy in the limited terms intended by the board and applied to the plaintiffs.

[5-7] The board's policy passess muster under the Equal Protection Clause of the Fourteenth Amendment if it satisfies the rational relation standard, which is the test ordinarily applicable to cases that involve the non-reemployment or dismissal of public school teachers. Cole v. Choctaw County Board of Education, supra; Fisher v. Snyder, 476 F.2d 375 (8 Cir. 1973); McEnteggart v. Cataldo, 451 F.2d 1109 (1 Cir. 1971), cert. denied, 408 U.S. 943, 92 S.Ct. 2878, 33 L.Ed.2d 767 (1972); Drown v. Portsmouth School District, 451 F.2d 1106 (1 Cir. 1971). By this standard, a regulation is invalid as a denial of equal protection of the law only if it is without some reasonable

basis and is palpably arbitrary; the regulation will be upheld so long as a state of facts reasonably can be conceived to support it. In our view, the board had ample justification to adopt its rule.

According to the weight of the evidence, the board was persuaded that the challenged rule was needed to eliminate racial discrimination from the public schools. Public school desegregation in Calhoun County was a controversial policy which caused a division in the community; many citizens immediately threw their support to continuing racial segregation in a private school to operate in competition with the public schools. Since white flight may present a serious obstacle to effective desegregation, a school board is empowered to adopt appropriate measures in aid of the schools under its charge. Defendants, without dispute, acted with no purpose or motive other than to strengthen local support for the public schools by requiring its teachers to give their undivided loyalty to the unitary school system and forego allegiance as patrons of schools practicing racial discrimination. A requirement of this kind, instead of being arbitrary and irrational, is based upon logic that is readily discernible. Defendants' experts in the field of educational psychology expressed the view which we accept, that the challenged policy was significantly related to a teacher's effectiveness and job performance: students in desegregated classes are likely to perceive rejection, and experience a sense of inferiority, from a teacher whose own children attend a nearby racially segregated school, and be inclined to perform at a lower educational level. Indeed, the Supreme Court itself has documented a finding that: "A sense of inferiority affects the motivation of a child to learn." Brown v. Board of Education, 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873, 880. Moreover, the Supreme Court, in *Norwood,* spoke of racially discriminatory private schools in these words:

> "Under Brown v. Board of Education, supra, discriminatory treatment exerts a pervasive influence on

> the entire educational process. The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education." 93 S.Ct. 2812, 37 L.Ed. 2d 733.

Thus, an adequate factual basis exists for concluding that public school teachers who send their own children to a segregated school manifest a belief that segregation is desirable in education and a distrust in desegregated schools. Actions speak louder than words, to students no less than to adults. We hold that the board's policy, where limited to racially discriminatory private schools, is a permissible regulation, adopted in keeping with the command of the Fourteenth Amendment and the desegregation order of this court to eliminate racial discrimination and remove its pervasive influence from the county's public schools.

[8, 9] Finally, we consider plaintiffs' claim that the board's failure to provide them with a hearing prior to termination violated their procedural due process rights. Mississippi, of course, does not have a tenure system for public school teachers, and plaintiffs have failed to show the existence of any rules or understandings with defendants whereby they would be continued in employment beyond the period of their teaching contracts. Plaintiffs held one-year contracts which expired at the end of the 1972-73 school year; they were not discharged during the school year. Although all of the plaintiffs had been employed in the Calhoun County school system for several preceding years, none had more than a "subjective expectancy" of reemployment generated by prior periods of employment. Under these circumstances, it is settled law that a hearing was not necessary. Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Skid-

more v. Shamrock Independent School District, 464 F.2d 605 (5 Cir. 1972); Moore v. Knowles, 466 F.2d 531 (5 Cir. 1927). In *Skidmore,* the court upheld the nonretention, without a board hearing or statement of reasons, of a teacher who had been employed for twenty-two consecutive one-year terms. In a Mississippi case, Thompson v. Madison County Board of Education, 476 F.2d 676, 679, the Fifth Circuit emphasized that at the *end* of a school year, a school board "can refuse to rehire a non-tenured teacher with no expectation of reemployment without any reason at all." In the instant case, however, plaintiffs were plainly advised of the reason for their nonretention and had every opportunity to seek a hearing before the board if they desired one. Indeed, the burden was incumbent upon them to initiate review proceedings, and to demonstrate that the board's failure to rehire was a violation of constitutionally protected interests. *Skidmore,* supra.

Assuming, however, that plaintiffs were entitled to a due process hearing, they have been accorded a full hearing in this court, and they have had opportunity to present evidence in support of their claims. In the light of the facts heretofore found, the court holds that the board's failure to rehire the plaintiff was a lawful act and did not constitute a violation of any constitutional rights held by plaintiffs.

Let an order dismissing the complaint with prejudice be entered.